RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,

Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONERS

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The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition nowhere disputes that the decisions below are the first to hold that a federal law validly may prohibit a State from repealing its own state-law prohibitions. Where the power Congress claims is unprecedented, it is a "telling indication of [a] severe constitutional problem." *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010). And so it is here. By holding that, through PASPA, Congress may indeed "directly ... compel the States to ... prohibit" certain acts, *New York* v. *United States*, 505 U.S. 144, 166 (1992), the decision of the Third Circuit cuts deeply into the core of the reserved sovereignty of the States.

The primary thrust of respondents' opposition is that these petitions present a question no different from petitioners' previous anti-commandeering challenge because the 2014 Act's repeal is substantively identical to the state licensing scheme that was at issue in that challenge. That is demonstrably wrong. The now-repealed 2012 Law did not, as respondents now suggest, merely "eliminate[] a prohibition on sports gambling." BIO i. Rather, it provided for the *licensing and extensive regulation* of certain sports wagering activities, which remained prohibited except as licensed and regulated. Under the 2014 Act, however, the state-law prohibitions were simply repealed as to those activities; there is no licensing or other state involvement in sports wagering at all, even at venues licensed to engage in other forms of gambling. That distinction is not mere "wordplay," *id.* at 23; it reflects a fundamentally different rela-

tionship between sports wagering and the State, and certainly is not the "exact same result that PASPA" affords to Nevada, and once offered to New Jersey, *id.* at 14.

Respondents themselves previously recognized that this distinction was important. When they last opposed certiorari, respondents argued that, under PASPA, "states may not license or authorize sports gambling," but "[n]othing ... compels states to prohibit or maintain any existing prohibition on sports gambling." Leagues' Br. in Opp. at 23, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014). And the United States likewise argued that States were free to repeal their prohibitions on sports wagering "in whole or in part." U.S. Br. in Opp. at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) (hereinafter, "U.S. Opp.").

Respondents' tune may have changed, but the critical distinction remains, and it is constitutionally significant. Congress lacks the power to compel a State to prohibit acts under its own state laws. If all a State does is narrow its own state-law prohibitions, there is nothing Congress constitutionally may preempt.

Respondents thus now mischaracterize this Court's pronouncement in *New York* that Congress may not "regulate state governments' regulation of interstate commerce," 505 U.S. at 166, as "a single line of dictum," and otherwise deride New Jersey's invocation of that principle as "splitless." BIO 2, 17, 18, 22. But the principle that Congress may not regulate States' regulation of interstate commerce hard-

ly is dictum; it is a bedrock principle of federalism on which the entire anti-commandeering doctrine is founded. And this Court need not await a division among the courts of appeals when one such court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

As respondents' write-off of the federalism principles of *New York* as "dictum" suggests, the decision below cannot be reconciled with this Court's decisions. And whether Congress may prohibit States from repealing their own state-law prohibitions surely qualifies as an "important federal question." This Court should grant the petitions.

I. The Third Circuit's *En Banc* Departure from Centuries of Federalism Warrants Immediate Review

The Third Circuit's decision deeply undermines the constitutional anti-commandeering principle and conflicts with decisions of this Court and the other courts of appeals. The heart of the commandeering doctrine under *New York* and *Printz* v. *United States*, 521 U.S. 898 (1997) is that Congress, within the scope of its enumerated powers, may regulate by acting "'*directly upon the citizens*,'" but may not "require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (quoting *Lane Cty.* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868)) (emphasis in original). Yet, *Christie II* directly violates the anti-commandeering principle by authorizing a federal court injunction mandating that a State reinstate prohibitions it has chosen to repeal.

A congressional mandate that existing state-law prohibitions be maintained in spite of the wishes of the local electorate undermines our system of representative democracy by foisting the blame for an increasingly unpopular federal policy on state officials that must carry out the federally petrified state-law prohibitions. And the matter is made worse by the fact that, while the Third Circuit insists that PASPA affords the States room to respond to the demands of their citizens, the range of permissible policy options remains unknown—purposefully obscured in the decision below and by the ever-shifting positions of respondents and the United States.

A. The Injunction Against New Jersey's Repeal Goes to the Heart of the Commandeering Doctrine

1. The line between constitutional regulation and unconstitutional commandeering—bolstered and bounded by over a century of precedent—is clear. Congress may, within the scope of its enumerated powers, regulate "state activities" and "private individuals." *Reno* v. *Condon*, 528 U.S. 141, 150–51 (2000). On the other hand, Congress may not "control or influence the manner in which States regulate private parties," *South Carolina* v. *Baker*, 485 U.S. 505, 514 (1988), "require the States in their sovereign capacity to regulate their own citizens," *Reno*, 528 U.S. at 151, or "require the States to govern according to Congress' instructions," *New York*, 505 U.S. at 162.

Congress thus may prohibit sports wagering by individuals to the extent of its commerce power, and may prohibit States, no less than private individuals,

from participating in sports wagering activities. What it may *not* do is precisely what the Third Circuit approved—mandate that States themselves suppress sports wagering by prohibiting it under state law.

2. Respondents' characterization of the Third Circuit's position as an unremarkable reflection of a consensus view of the Tenth Amendment's scope misstates the law under both PASPA and the broader anti-commandeering doctrine.

With respect to PASPA, respondents contend that "every court to consider New Jersey's arguments has rejected them," BIO 17, a point that would be more persuasive if "every court" were not a single court of appeals, in a series of sharply divided decisions, and a single district court whose reasoning that PASPA leaves States only a "binary choice" between complete prohibition and complete repeal of all such prohibitions was rejected by the Third Circuit and the United States. Pet. App. 23a; Br. of U.S. as *Amicus Curiae* at 13–14, *Christie II* (Nos. 14-4546, 14-4568, and 14-4569) (hereinafter "U.S. Amicus"). Indeed, the *Christie I* panel rejected the State's constitutional challenge *only* because of the narrowing construction that panel adopted, and that the United States embraced before this Court, *see* U.S. Opp. 11, but which the *en banc* court now has "excise[d]." Pet. App. 23a.

With respect to the broader anti-commandeering doctrine, respondents are simply incorrect that the Third Circuit's decision reflects a consensus view. Contrary to respondents' description of *New York*'s

anti-commandeering language as "dictum," BIO 23–24 (citing *New York*, 505 U.S. at 166), circuit courts have consistently treated that language as a clear holding of this Court. *See, e.g.*, *ACORN* v. *Edwards*, 81 F.3d 1387, 1394 (5th Cir. 1996) (federal law requiring States to establish programs remedying lead contamination in drinking water violated Tenth Amendment because it "force[d] States to regulate according to Congressional direction"); *Koog* v. *United States*, 79 F.3d 452, 458 (5th Cir. 1996) (interim duties imposed on state officials through Brady Act violated Tenth Amendment even though Act did not order State to draft and enact legislation); *United States* v. *Wall*, 92 F.3d 1444, 1480 (6th Cir. 1996) (*New York*'s statement that Congress "cannot regulate state governments' regulation of interstate commerce" was a holding).

Thus, if the decision below incorporates respondents' view of the tenet that Congress may not regulate the States' regulation of interstate commerce as merely "dictum," this case is not "splitless" at all.

3. Respondents maintain that PASPA cannot violate the anti-commandeering doctrine because the statute does not require New Jersey to "maintain state-law prohibitions," BIO 30 (quoting N.J. Pet. 3), or even to "lift a finger," *id.* at 28 (quoting Pet. App. 25a). This is a perplexing argument given the lower court's injunction that effectively "obligate[s]" the State "to enforce ... sports gambling prohibitions" revived as a result of the injunctions. *Id.* at 30 n.6. Respondents suggest New Jersey could escape this compulsion by taking completely off "the books" the general prohibition on sports wagering that the 2014

Act merely narrowed. *Id.* But that would mean that PASPA does in fact put New Jersey to the "binary choice" that the United States rejected and the Third Circuit disclaimed, and that runs counter to this Court's decision in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566 (2012). *See* N.J. Pet. 28 n.4.

But even if the injunction here left New Jersey some kind of a cognizable choice, it still would impermissibly commandeer by dictating the contents of New Jersey's state-law prohibitions. Congress can offer States a choice of adopting a federal scheme or ceding to federal authority, *see Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), but it cannot foist upon the States one, two, or even a menu of state-law prohibitions from which the State must choose. That manifestly would "require the States to govern according to Congress' instructions," and is not permissible under our Federalism. *New York*, 505 U.S. at 162.

4. The unprecedented nature of the power the Third Circuit claims for Congress here defies respondents' characterization of PASPA as a "straightforward" example of preemption. BIO 18. This argument first runs into the reality that the 2014 Act, in sharp contrast to the 2012 Law, did no more than alter the scope of New Jersey's prohibitions on sports wagering, such that, for a category of sports-wagering activity, no state law prohibits or governs

it. Pet. App. 219a–222a.[1] Accordingly, what PASPA would have to preempt is the *absence* of state law, a nonsensical theory of preemption. And respondents tellingly cannot deliver even one other example of a federal law that prevents a State from repealing its own state-law prohibitions.

Respondents' preemption theory suffers from the further flaw that there is no *federal* regulatory or deregulatory scheme that has preemptive effect. Construing the Supremacy Clause as conferring "a license to Congress to prohibit state lawmaking whenever and however it desires," without the need to adopt federal law to warrant supremacy over state law, is commandeering, not preemption. States' Br. 11.[2]

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[1] Respondents repeatedly suggest that the 2014 Act is not a "true" repeal because it did not amend the preexisting prohibition itself. BIO 30. But they concede (also at 30) that the 2014 Act "alter[ed] the scope" of New Jersey's prohibitions on sports wagering when it "repealed" those prohibitions as to certain activities. Pet. App. 219a–222a. That the 2014 Act was enacted as a freestanding "repealer" statute rather than an amendment to an existing one has no bearing on the question presented.

[2] Contra-v to respondents' contentions, BIO 33, Congress' adoption of *other* regulations or criminal prohibitions in the gambling context merely highlights that it could have done so here, rather than commandeering the States. Its unlawful approach is not cured by PASPA's prohibition on sports wagering by individuals (28 U.S.C. § 3702(2)) because that provision, which prohibits gambling only if it occurs "pursuant to State law," Pet. App. 159a–160a, suffers from the same constitutional infirmity as section 3702(1).

B. Permitting the Federal Government To Dictate the Content of State Law Distorts Accountability

Commandeering has real-world consequences, including disrupting the lines of accountability between the state and federal governments and the people. Respondents' contention that, after four years of litigation, there is no doubt that "PASPA, not New Jersey, is to blame" for the lack of sports betting in the State, BIO 35, is unsupported as a factual matter and irrelevant in any event.

As this Court said in *New York*, when Congress "compels States to regulate," it is no longer making policy decisions "in full view of the public" and state officials, rather than federal officials, "suffer the consequences if the decision turns out to be detrimental or unpopular." 505 U.S. at 168; *see also Printz*, 521 U.S. at 930 ("[E]ven when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."); N.J. Pet. 29–31. Nothing in *New York* or *Printz* suggested that those accountability concerns turn on the notoriety of the federal law in question (indeed, the Brady Act was far better known than PASPA), or whether citizens understood the effect of the federal mandate. What matters is whether, as a practical matter, state officials will be blamed for federal policies they are required to follow and enforce against the public. *See Printz*, 521 U.S. at 930.

The Third Circuit's decision maintains New Jersey's prohibition on sports wagering (e.g., N.J. Stat.

Ann. § 2A:40-1), and shifts the burden to the States to discover the "room" they have in which to govern—assuming such room is not, in fact, wholly illusory. Pet. App. 24a; *see also* BIO 23 ("New Jersey *may also be able* to repeal or modify aspects of [its] prohibitions without repealing them entirely.") (emphasis added). There can be no doubt that this approach "creat[es] the appearance that state officials are responsible for policies that Congress forced them to enact," BIO 35 (emphasis omitted), which is precisely the sort of accountability shifting that *New York* sought to guard against. *See* PLF Br. 11–12; States' Br. 14–15.

C. The Infringement of State Sovereignty Effected by the Third Circuit's Opinion Warrants Immediate Review

The Third Circuit's decision presents yet another problem warranting this Court's review: it generates enormous uncertainty and thereby inhibits States' ability to address the pressing problems presented by illegal sports wagering. Under *Christie II*, it is unclear how the Third Circuit would evaluate the legality of any state action other than the specific repeal that New Jersey enacted here. But as a matter of federalism, the boundaries of federal preemption must be clear. Here, they are anything but.

As New Jersey's *amici* have explained, illegal sports gambling poses a number of challenges for States, including enabling and funding other illegal activity, inhibiting state efforts to protect consumers, and depriving States of needed revenue and tourism.

AGA Br. 11, 13. Yet the Third Circuit's decision leaves States unsure of which steps will lead to productive policymaking and experimentation, and which steps will lead to years of costly and time-consuming litigation. *See* PLF Br. 7, 10–11; AGA Br. 21–22. Respondents cannot plausibly maintain that other States must engage in the fruitless effort to discern PASPA's scope before this Court's review becomes appropriate.

Nor should the States' sovereignty be constrained by the whims of self-interested private entities (such as respondents) or those of the United States. In *Christie I*, the Third Circuit carefully distinguished between merely "repealing" a prohibition and the affirmative authorization by law that violates PASPA. Pet. App. 158a. In its brief before this Court in *Christie I*, the United States explained, without qualification, that review was not warranted because New Jersey could repeal its restrictions on sports wagering "in whole or in part." U.S. Opp. 11.

New Jersey followed the directions of the Third Circuit and the United States to the letter, sacrificing the control it initially sought over sports wagering to ensure that there was no arguable "authoriz[ation] by law" under *Christie I*. Respondents then sued again and broadened PASPA's scope, arguing that, under *Christie I*, New Jersey had only a binary choice—repeal prohibitions on sports wagering entirely, or leave them all in place. The district court agreed, but the Third Circuit (and the United States) did not. Yet, the court refused to clarify what else, beyond

maintaining the status quo or enacting a complete repeal, would satisfy PASPA.

Now, respondents are careful to leave themselves room to argue that PASPA is *even broader* than the Third Circuit has held, acknowledging only that, in addition to a complete repeal, States "*may also be able*" to alter the scope of their prohibitions. BIO 23 (emphasis added). And the United States, which has been silent on the constitutionality of PASPA as now construed by the Third Circuit, has suggested a similarly broad, yet different, scope to PASPA—that *all* partial repeals may be impermissible if they are intended to benefit a State's economy (which, of course, all would be). U.S. Amicus 9.

Our Constitution's guarantee of federalism cannot rest on such indeterminate platitudes: The States—co-equal sovereigns in our system of federalism—should not be required to guess whether their efforts to liberalize restrictions on sports wagering are prohibited by federal law.

Where fundamental sovereign rights and the balance of power between the state and federal governments are at stake, this Court's review is warranted. In *New York*, for example, as here, opponents of certiorari argued there was no "conflict with the decision of any other court of appeals" (which New York did not meaningfully dispute), and maintained that review should be postponed until other courts could "provide definitive guidance" on the issues. U.S. Br. in Opp. at 14, 16, 25–26, *New York* v. *United States*, 505 U.S. 144 (1992) (No. 91-543). Yet this Court nevertheless granted

review to adopt the clear principles surrounding the commandeering doctrine that respondents now dismiss as dictum. Such guidance is equally needed here, in the face of a federal court injunction that prohibits a State from repealing its own laws and subjects its sovereign rights to respondents' selective efforts to enforce PASPA.

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

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